

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	8:03CR36
)	
v.)	
)	ORDER
JUAN M. RODRIGUEZ,)	
)	
Defendant.)	

This matter is before the court for initial review of the defendant's Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (§ 2255 motion) (Filing No. 305). Rule 4(b) of the *Rules Governing Section 2255 Proceedings for the United States District Courts* requires initial review of the defendant's § 2255 motion. Rule 4(b) provides:

Initial Consideration by the Judge. The judge who receives the motion must promptly examine it. If it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief, the judge must dismiss the motion and direct the clerk to notify the moving party. If the motion is not dismissed, the judge must order the United States attorney to file an answer, motion, or other response within a fixed time, or to take other action the judge may order.

The record indicates that a jury convicted the defendant to one count of conspiracy to distribute and possess with intent to distribute 500 grams or more of methamphetamine and one count of possession with intent to distribute 50 grams or more but less than 500 grams of methamphetamine. See Filing No. 250, Judgment in a Criminal Case. The court sentenced the defendant to the custody of the Bureau of Prisons for 300 months, followed by 10 years supervised release with special conditions. See *id.* The defendant filed a direct appeal claiming: 1) the evidence was insufficient to support the verdicts; 2) the district court abused its discretion in denying his request for a *Franks*¹ hearing; and 3) the district court miscalculated his sentencing guideline range for having illegally reentered the United States following deportation. The Eighth Circuit affirmed the judgment of the district

¹*Franks v. Delaware*, 438 U.S. 154 (1978).

court, but reversed and remanded for resentencing. See Filing No. 283. The defendant was resentenced to the custody of the Bureau of Prisons for 240 months and 210 months, to be served concurrently, followed by a 10-year and 5-year supervised release, also to be served concurrently. See Filing No. 291, Amended Judgment in a Criminal Case.

In his § 2255 motion, the defendant alleges that the plaintiff's Notice of Intent to Adduce Evidence Pursuant to Title 21, United States Code, Section 851 (Filing No. 229) was invalid and his counsel was not effective in objecting to this Notice. See Filing No. 305.

It does not plainly appear from the motion and the record of prior proceedings that the defendant is not entitled to relief. Therefore, I will order the United States to respond by answer to the defendant's claims. In addition to any other matters discussed in the answer, the United States shall address whether any of the defendant's § 2255 claims are barred, for example by waiver and/or untimeliness.

THEREFORE, IT IS ORDERED:

1. That upon initial review, the court finds that summary dismissal of the defendant's § 2255 motion is not required.

2. That by January 17, 2008, the United States shall file an answer to the defendant's § 2255 motion, supported by a brief.

3. That by February 17, 2008, the defendant may file a reply brief.

DATED this 18th day of December, 2007.

BY THE COURT:

s/ Joseph F. Bataillon

JOSEPH F. BATAILLON
United States District Judge